

**CALIFORNIA COASTAL COMMISSION**

NORTH COAST DISTRICT OFFICE

MAILING ADDRESS:

710 E STREET • SUITE 200

P. O. BOX 4908

EUREKA, CA 95501-1865

EUREKA, CA 95502-4908

VOICE (707) 445-7833

FACSIMILE (707) 445-7877



# W15a

Filed:	August 14, 2003
49 <sup>th</sup> Day:	Waived
Staff:	Randall Stemler
Staff Report:	February 27, 2004
Hearing Date:	March 17, 2004
Commission Action:	

**STAFF REPORT: APPEAL****SUBSTANTIAL ISSUE**

LOCAL GOVERNMENT:	County of Mendocino
DECISION:	Approval with Conditions
APPEAL NO.:	<b>A-1-MEN-03-052</b>
APPLICANT:	<b>Edge Wireless</b>
PROJECT LOCATION:	Approximately ¾ mile south of the town of Mendocino, west of Highway One approximately 0.2 mile southwest of the intersection of Highway One and the Comptche-Ukiah Road, between Road 500B and the Pacific Ocean, located at 9950 Road 500B (APN 119-310-09).
PROJECT DESCRIPTION:	Installation of a wireless telecommunications (cellular) facility consisting of an antenna concealed below the deck of an existing residence, a radio cabinet within an existing garage, new underground electrical and telephone services, and an underground coaxial cable from the radio cabinet to the antenna.
APPELLANTS:	1) James & Bettilou Lovera; 2) Arthur Firstenberg.
SUBSTANTIVE FILE DOCUMENTS:	1) Mendocino County CDU No. 1-2003; and 2) Mendocino County Local Coastal Program

**SUMMARY OF STAFF RECOMMENDATION:**

The staff recommends that the Commission, after public hearing, determine that NO SUBSTANTIAL ISSUE exists with respect to the grounds on which the appeal has been filed.

The development, as approved by the County, consists of installation of a wireless telecommunications (cellular) facility consisting of an antenna concealed below the deck of an existing residence, a radio cabinet within an existing garage, new underground electrical and telephone services, and an underground coaxial cable from the radio cabinet to the antenna. The project site is a blufftop parcel approximately ¾-miles south of the Town of Mendocino off of Road 500B (Brewery Gulch Drive).

The two appellants collectively pose fourteen separate contentions that the project as approved is inconsistent with the certified Mendocino County Local Coastal Program (LCP) and the public access policies of the Coastal Act. These contentions include: (1) allegations of detrimental health effects from radio frequency radiation (RFR); (2) allegations that the permit was obtained by fraud; (3) allegations of previous coastal development permit violations by the property owner; (4) failure to adhere to the Planning Commission's Wireless Communications Facilities Guidelines; (5) lost revenue when cellular service facilities are not located on public property; (6) non-compliance with the Americans with Disabilities Act (ADA); (7) geologic hazard; (8) the fact that the communication antenna is not a principally permitted use; (9) inconsistencies with the non-conforming structures provision of the LCP; (10) impacts on environmentally sensitive habitat area (ESHA); (11) impacts on visual resources; (12) inconsistencies of the zoning code requirements related to the California Environmental Quality Act (CEQA); (13) lack of public notice; and (14) allegations that inconsistencies with the LCP were overlooked because of a misinterpretation of federal law.

Staff recommends that the Commission find that contentions 1-6 are invalid grounds for appeal and that contentions 7-14 do not raise a substantial issue of conformity of the approved development with the certified LCP.

Specifically, with regard to the contentions that are invalid grounds for appeal, staff is recommending that the Commission find that the contentions regarding the detrimental effects from radio frequency radiation are not valid grounds for appeal as they do not allege an inconsistency of the approved development with any policy or standards of the certified LCP. In addition, the regulation of RFR emissions is a federal matter not within the purview of the Mendocino County LCP.

Staff is recommending that the Commission find that the contention concerning allegations that the permit was obtained by fraud does not raise valid grounds for appeal, because the contention raises a procedural issue related to whether revocation could be taken up with the County after approval, and is not a substantial or substantive inconsistency of the approved project with the certified LCP. In addition, the allegations of fraud relate to whether the conditions of approval are adequate to mitigate the effects of RFR, a matter governed by federal law and not the certified LCP.

Staff is recommending that the Commission find that the contention that there are previous coastal development permit violations on the property does not raise valid grounds for appeal as no inconsistencies of the project as approved with the certified LCP stemming from any violations have been identified, and the consistency of the approved project with the certified LCP is not affected by any un-permitted development.

Similarly, staff is recommending that the Commission find that the contentions concerning inconsistencies with Planning Commission Wireless Communications Facilities Guidelines and non-conformance with the Americans with Disabilities Act are invalid grounds for appeal, as the guidelines and laws cited are not policies of the certified LCP with which the approved development must conform.

Similarly, staff is recommending that the Commission find that the contention that the cellular service facility should be located on public property so that revenue from leasing the site for the communications facility would go to a public agency does not raise valid grounds for appeal as the contention fails to identify an inconsistency of the project as approved with the certified LCP.

Regarding the contentions that are valid grounds for appeal, staff recommends that the Commission find that the contentions regarding geologic hazard, principally permitted structures, non-conforming structures, ESHA protection, visual resources, inconsistencies with zoning code provisions related to CEQA, lack of appropriate public notice, and inconsistencies with the LCP that were overlooked because of a misinterpretation of federal law are valid grounds for appeal but do not raise a substantial issue of conformance of the approved development with the policies and standards of the LCP.

Staff recommends that the Commission find that the contention regarding geologic hazards does not raise a substantial issue because the antenna would be hung under the presently permitted residence and the approved development would create no greater geologic hazard and create no greater need for future shoreline protective works than already exists.

Staff recommends that the Commission find that the contention regarding principally permitted uses does not raise a substantial issue because although the development is a conditional use, a use permit was approved for the development by the County.

Staff recommends that the Commission find that the contention regarding non-conforming structures does not raise a substantial issue because there is no evidence that the existing residence is a non-conforming structure and that even if the house were non-conforming, the house would conform with the conditions specified in the non-conforming structures section of the certified coastal zoning code and would therefore be allowed to continue.

Staff recommends that the Commission find that the contention regarding environmentally sensitive habitat areas (ESHA) protection does not raise a substantial issue because there are no indications of ESHA on the subject property.

Staff recommends that the Commission find that the contention regarding visual resources does not raise a substantial issue of conformance with the policies or standards of the LCP relating to development in highly scenic areas because the project as approved would have an insignificant impact on public views to and along the coast as (1) the placement of the radio equipment within the existing garage would completely hide from view that portion of the approved development; (2) the stealth antenna hung under the existing deck would be camouflaged to look like the other foundation piers for the platform of the house and deck; and (3) the improvement to the fence running along the road frontage would match the materials and height of the existing fence.

Staff recommends that the Commission find that the contention regarding inconsistencies of the project as approved with the coastal zoning code provisions relating to CEQA does not raise a substantial issue because the County did follow CEQA procedures in its action on the permit and the contention raises a procedural issue, rather than a substantial or substantive inconsistency of the approved project with the certified LCP.

Staff recommends that the Commission find that the contention regarding the lack of appropriate public notice does not raise a substantial issue because the contention raises a procedural inconsistency and not a substantive inconsistency of the approved project with the certified LCP.

Finally, staff recommends that the Commission find that the contention alleging that the inconsistencies with the LCP were overlooked because of a misinterpretation of federal law does not raise a substantial issue because all of the specific contentions raised in the appeals have been reviewed and evaluated and determined not to raise a substantial issue of conformance of the project as approved with the certified LCP, regardless of how the federal law is interpreted.

For all of the above reasons, staff recommends that the Commission find that the appeal raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency of the approved project with the certified LCP and the public access policies of the Coastal Act. The motion to adopt the staff recommendation of No Substantial Issue is found on Page No. 6.

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**STAFF NOTES:**

1. **Appeal Process**

After certification of Local Coastal Programs (LCPs), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits (Coastal Act Section 30603).

Section 30603 states that an action taken by a local government on a coastal development permit application may be appealed to the Commission for certain kinds of developments, including developments located within certain geographic appeal areas, such as those located between the sea and the first public road paralleling the sea, or within three hundred feet of the inland extent of any beach, or of the mean high tide line of the sea where there is no beach, or within one hundred feet of any wetland or stream, or within three hundred feet of the top of the seaward face of any coastal bluff, or those located in a sensitive coastal resource area.

Furthermore, developments approved by counties may be appealed if they are not designated the “principal permitted use” under the certified LCP. Finally, developments which constitute major public works or major energy facilities may be appealed, whether approved or denied by the city or county. The grounds for an appeal are limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program and, if the development is located between the first public road and the sea, the public access policies set forth in the Coastal Act.

The subject development is appealable to the Commission because the proposed house is located (1) between the sea and the first public road paralleling the sea; (2) within 300 feet of the mean high tide line; (3) within 300 feet of the top of the seaward face of a coastal bluff; and (4) within a sensitive coastal resource area. Section 20.308.110(6) of the Mendocino County Zoning Code and Section 30116 of the Coastal Act define sensitive coastal resource areas as “those identifiable and geographically bounded land and water areas within the coastal zone of vital interest and sensitivity,” including, among other categories, “highly scenic areas.” The approved development is located within an area designated in the LCP on the certified land use map as a “highly scenic area,” and, as such, is appealable to the Commission. The subject development is also appealable to the Commission because the approved telecommunications facility is not a principally permitted use.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue is raised by the appeal. In this case, because the staff is recommending no substantial issue, the Commission will hear arguments and vote on the substantial issue question. Proponents and opponents will

have three minutes per side to address whether the appeal raises a substantial issue. The only persons qualified to testify before the Commission on the substantial issue question are the applicant, the appellant and persons who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding substantial issue must be submitted in writing. It takes a majority of Commissioners present to find that no substantial issue is raised.

Unless it is determined that there is no substantial issue, the Commission would continue with a full public hearing on the merits of the project, which may occur at a subsequent meeting. If the Commission were to conduct a *de novo* hearing on the appeal, because the proposed development is between the first road and the sea, the applicable test for the Commission to consider would be whether the development is in conformity with the certified Local Coastal Program and with the public access and public recreation policies of the Coastal Act.

2. Filing of Appeal

Two appeals were filed by (1) James and Bettilou Lovera (hereafter referred to as Appellant #1); and (2) Arthur Firstenberg (hereafter referred to as Appellant #2) (Exhibit Nos. 5 and 6). Both appeals were filed with the Commission in a timely manner on August 14, 2003 within 10 working days of receipt by the Commission of the County's Notice of Final Action (Exhibit No. 4) on August 1, 2003.

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**I. MOTION, STAFF RECOMMENDATION AND RESOLUTION**

Pursuant to Section 30603(b) of the Coastal Act and as discussed below, the staff recommends that the Commission determine that no substantial issue exists with respect to the grounds on which the appeal has been filed. The proper motion is:

**MOTION:**

I move that the Commission determine that Appeal No. A-1-MEN-03-052 raises NO substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

**STAFF RECOMMENDATION:**

Staff recommends a **YES** vote. Passage of this motion will result in a finding of No Substantial Issue and adoption of the following resolution and findings. If the Commission finds No Substantial Issue, the Commission will not hear the application *de novo* and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

**RESOLUTION TO FIND NO SUBSTANTIAL ISSUE:**

The Commission hereby finds that Appeal No. A-1-MEN-03-052 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency of the approved project with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

**I. FINDINGS AND DECLARATIONS.**

The Commission hereby finds and declares:

**A. APPELLANTS' CONTENTIONS.**

The Commission received two appeals of the County of Mendocino's decision to approve the development from James and Bettilou Lovera (Appellant #1), and Arthur Firstenberg (Appellant #2). The project as approved by the County involves installation of a wireless telecommunications (cellular) facility consisting of an antenna concealed below the deck of an existing residence, a radio cabinet within an existing garage, new underground electrical and telephone services, and an underground coaxial cable from the radio cabinet to the antenna. The project is located along the Mendocino County coastline, approximately  $\frac{3}{4}$  mile south of the town of Mendocino, west of Highway One approximately 0.2 mile southwest of the intersection of Highway One and the Comptche-Ukiah Road, between Road 500B and the Pacific Ocean, located at 9950 Road 500B.

The appeals raise fourteen contentions alleging inconsistency of the approved project with the County's certified LCP. The appellants' contentions are summarized below, and the full text of the contentions is included as Exhibit Nos. 5 and 6.

**1. Detrimental Health Effects Posed From Radio Frequency Radiation (RFR).**

Both appellants contend that approval of the project would jeopardize public health and safety by allowing installation of a wireless telecommunication (cellular) facility that would propagate dangerous radio frequency radiation (RFR).

**2. Permit Obtained by Fraud**

Appellant #2 contends that the project as approved by the County was granted a permit based on fraudulent information provided to the County to justify compliance with Federal Communications Commission (FCC) RFR exposure limits. The appellant contends that the mitigations imposed by the County were based on the fraudulent data in the report and thus are wholly inadequate to address the effects of the true RFR exposure conditions on-site.

3. Previous Violations by the Property Owner

Both appellants contend that there is a long-standing coastal development permit violation on the subject property regarding an illegal amateur radio antenna sited on the owner's (King) property. Additionally, the appellants contend that the deck of the existing residence is not up to code.

4. Inconsistencies with LCP Overlooked Because of Misinterpretation of Federal Law

Appellant #1 contends that the County only approved the project out of a mistaken belief that denial of the project would constitute a prohibition of the provision of personal wireless communications facilities in violation of federal law.

5. Failure to Adhere to Planning Commission Guidelines

Appellant #1 contends that the project as approved is not consistent with Planning Commission Guidelines adopted by Mendocino County in November 2001.

6. Lost Revenue When Cellular Service Facilities are Not Located on Public Property

Appellant #1 contends that cellular service facilities should be located on public property rather than on private property so that local agencies of government would benefit from fees paid for the use of the property.

7. Non-compliance with Americans with Disabilities Act (ADA)

Appellant #2 contends that a request for accommodation under ADA was ignored by the Mendocino County Board of Supervisors prior to approval of the project.

8. Inconsistencies of Zoning Code Requirements Related to the California Environmental Quality Act (CEQA)

Appellant #2 contends that the project as approved by the County is inconsistent with Coastal Zoning Code (CZC) Section 20.532.040 and CEQA requirements because the environmental review for the project is flawed with regard to human health, animal, and bird life. Inconsistency of the County's approval of the project with the LCP is cited.

9. Lack of Public Notice

Appellant #2 contends that the project as approved is inconsistent with LCP CZC Sections 20.536.005(D)(4) and (6) because public notice was not given prior to the



County adding a condition of approval for installation of a wooden fence and gate along the property frontage along County Road 500B.

10. Geologic Hazard

Appellant #2 contends that the project as approved by the County is inconsistent with the requirement of CZC Section 20.500.020(B)(1) that new development be set back from the edges of bluffs to ensure their safety from bluff erosion for a period of 75 years.

11. Not a Principally Permitted Use

Appellant #2 contends that the project as approved is not a principally permitted use in the Rural Residential zone.

12. Non-Conforming Structures

Appellant #2 contends that the project as approved by the County is inconsistent with CZC Section 20.480.010, which lists conditions under which non-conforming structures may be continued. The appellant states that the addition of new use types is not one of those conditions that allow the continuance of a non-conforming structure.

13. Environmentally Sensitive Habitat Area (ESHA) Protection

Both appellants contend that the project as approved by the County is inconsistent with LUP Policy 3.1-2 as the development would not adequately protect ESHA including habitat supporting ground animals and bird rookeries.

14. Visual Resources

Both appellants contend that the project as approved by the County is inconsistent with the visual resource protection provisions of the LCP. Appellant #1 asserts that the existing ham radio antenna tower located on the subject property is extremely visible, and for years “has defied every principle of the Coastal Act as related to preservation of the view corridor.” Additionally, Appellant #1 asserts that the County approval results in an inadequate opportunity for co-location for more future communication facilities leading to future visual blight.

**B. LOCAL GOVERNMENT ACTION.**

On April 17, 2003, the Mendocino County Planning Commission held a lengthy public hearing on the project proposal, at the conclusion of which, the hearing on the project was continued to a later time. On May 15, 2003, the Mendocino County Planning Commission failed to reach a majority vote to either deny or approve the project. The motion to deny failed on a 2-3 vote. Under Planning Commission rules, four votes are

required to take an action in effect resulting in denial of the project. The Planning Commission's failure to reach a definitive action on May 15, 2003 was appealed to the Mendocino County Board of Supervisors by the applicant. On July 22, 2003 the Board of Supervisors approved with conditions the Coastal Development Use Permit for installation of a wireless telecommunications facility consisting of an antenna concealed below the deck of an existing residence, a radio cabinet within an existing garage, new underground electrical and telephone service, and an underground coaxial cable from the radio cabinet to the antenna.

The County attached twenty-two conditions of approval to the permit. The full text of all of the conditions is found on pages 2 through 4 of Exhibit No. 4 (the Notice of Final Local Action). The conditions that are most relevant to the contentions raised in the appeals are Condition Nos. 6,11,12,13,17,18,19,20,21,and 22. These conditions of the County approval are listed below:

6. One or more warning signs consistent with FCC and ANSI regulations, shall be displayed in close proximity to the antenna. Provided that the locations meet applicable requirements, the signs shall be located below the deck, on the north and west sides, to minimize aesthetic impacts from the public road. If a sign is required to be visible from the road, or the main approach to the property, it shall be mounted on the wall of the residence, if permissible, rather than on a separate free-standing support. The intent is that Federal safety requirements will be met with the least visual impact from public locations.
11. By commencing work allowed by this permit, the applicant agrees to negotiate in good faith with third parties requesting shared use of the site.
12. Prior to the final inspection by the Building Division, an identification sign for each company responsible for operation and maintenance of facilities at the site, not larger [than] one square foot, shall be mounted on an exterior wall in a location visible when approached from the street, and shall provide the name, address, and emergency telephone number of the responsible companies. The address assigned to the site by the Planning and Building Services Department shall also be posted.
13. The antennas and supporting structure shall be inspected every five years, and following significant storm or seismic events, by a structural engineer licensed in the State of California to assess their structural integrity, and a report of the engineer's findings shall be submitted to the Planning and Building Services Department.
17. This permit is subject to the securing of all necessary permits for the proposed development and eventual use from County, State and Federal

agencies having jurisdiction. Any requirements imposed by an agency having jurisdiction shall be considered a condition of this permit.

18. This permit shall be subject to revocation or modification by the Planning Commission upon a finding of any one or more of the following grounds:
  - a. That the permit was obtained or extended by fraud.
  - b. That one or more of the conditions upon which the permit was granted have been violated.
  - c. That the use for which the permit was granted is conducted in a manner detrimental to the public health, welfare or safety, or is a nuisance.

Any revocation shall proceed as specified in Title 20 of the Mendocino County Code.

19. This permit is issued without a legal determination having been made upon the number, size or shape of parcels encompassed within the permit boundaries. Should, at any time, a legal determination be made that the number, size or shape of parcels within the permit boundaries are different than that which is legally required by this permit, this permit shall become null and void.
20. Under encroachment procedures administered by the Mendocino County Department of Transportation, as may be applicable, a wooden fence and gate(s), designed to match the existing rough finished wooden fence and gates (maximum space between pickets: four inches) along the property frontage along County Road 500B, from the northeast corner of the structure, paralleling the County Road, shall be installed along the length of the property frontage. Gates and fences shall be installed and maintained at each of the driveway entrances, which shall be closed except [sic] for short-term purposes of encroachment.
21. Within 90 days or prior to activation of service of the wireless communication equipment on the site, whichever occurs first, the property owner shall remove the existing tower and antenna on the site.
22. Within 30 days, the applicant shall apply for a building permit for the deck, westerly side of the dwelling. The permit shall be administered under the appropriate building permit standard as determined by the Building Official. Work shall be completed within 90 days.

The Notice of Final Action of the Board's approval of the project was received by Commission staff on August 1, 2003 (Exhibit No. 4). The County's approval of the project was appealed to the Coastal Commission in a timely manner on August 14, 2003 within 10-working days after receipt by the Commission of the Notice of Final Local Action. Staff requested a copy of the local record on August 14, 2003. A copy of the local record was received on September 2, 2003.

**C. PROJECT AND SITE DESCRIPTION.**

Approval has been granted by the County to install a wireless telecommunications (cellular) facility consisting of an antenna concealed below the deck of an existing residence. The project consists of placing a 53-inch by 25-inch radio cabinet within an existing 28-foot by 24-foot, approximately 6-foot-tall, 672-square-foot garage structure, extending underground electric service to the garage from an existing power source across the street, adding appropriate wiring within the garage to the radio cabinet, and adding underground coaxial cable from the cabinet to a stealth antenna to be located underneath the exterior deck of the existing 18-foot-tall, 1,118-square-foot residential "dome" structure. The antenna would be housed in a custom fiberglass composite shell that has the appearance of the adjacent concrete pier supports that serve as foundations for the deck platform and residence (Exhibit Nos. 3 and 7). No grading, vegetation removal, or road extensions would be performed. Minimum trenching would be required for running electrical power and coaxial lines.

The subject property is an approximately 2¾-acre, bluff top parcel located approximately ¾ of a mile south of the Town of Mendocino and about .2 of a mile southwest of the intersection of Highway One and Comptche-Ukiah Road at 9950 Road 500B (Brewery Gulch Drive), Mendocino County (Exhibit Nos. 1 and 2).

The site has been previously developed with a residence and garage built pursuant to Coastal Development Permit (CDP) No. NCR-CC-73-049 approved by the Commission on June 14, 1973 (Exhibit No. 8). There also is a ham radio tower and antenna located in the front yard of the property between the garage and the residence, which is allegedly un-permitted development because it was constructed without the benefit of a coastal development permit. The antenna extends to a height approximately 60 feet above the ground, and is mounted on the approximately 37-foot-tall lattice tower affixed to a wooden pole.

The terrain of the subject property includes the rocky bluff face and the flat, open, bluff top covered with mowed grassland without any trees, and underlain by stable bedrock. There are no indications of ESHA on the property.

The parcel is in an area along the Mendocino coastline designated as highly scenic. Due to the siting and design of the approved development, very little of the facility would be visible. New utility services to the approved antenna would be placed underground.

Radio equipment would be housed within the existing garage. The antenna itself would be located underneath the deck/foundation of the existing house, and contained in a fiberglass composite shell designed to mimic the appearance of the other concrete posts that support the deck and house.

The County's Land Use Plan classification for the parcel is Rural Residential – 5-acre minimum (RR-5). The same classification also applies to the neighboring parcels. Within the RR-5 classification, uses allowed by conditional permit include “major impact services and utilities” and “minor impact services and utilities.”

**D. SUBSTANTIAL ISSUE ANALYSIS.**

Section 30603(b)(1) of the Coastal Act states:

*The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.*

**1. Appellants' Contentions That Are Not Valid Grounds For Appeal**

Six of the fourteen contentions raised by the appellants do not present valid grounds for appeal. As discussed below, these six contentions are raised in regard to (a) detrimental health effects from RFR; (b) allegations that the permit was obtained by fraud; (c) allegations of previous coastal development permit violations by the property owner; (d) failure to adhere to the Planning Commission's Wireless Communications Facilities Guidelines; (e) lost revenue when cellular service facilities are not located on public property; and (f) non-compliance with ADA. These contentions do not allege inconsistencies of the approved development with the policies and standards of the certified LCP and thus, are not valid grounds for appeal pursuant to Section 30603(b)(1) of the Coastal Act.

**a. Detrimental Health Effects Posed From Radio Frequency Radiation (RFR)**

Both appellants raise a contention that the County's approval of the project would subject the public and adjacent neighbors to detrimental health effects.

On behalf of Appellant #1 (the property owner's immediate neighbor to the south) attorney Rodney Jones states that “the Lovera's concern involves health and peace of mind, based on the reality that they will find themselves exposed to a significant electromagnetic field and bombarded by radio frequency radiation...what many contend is a major health hazard. It also presents itself as an economic and health hazard “albatross” that will attach to their property in perpetuity.” Attorney Jones goes on to state that due to the “uncertainty about the long-range health effects” of radio frequency

radiation, “approval of the facility would mean an immediate loss in their property value and significantly impair their right to quiet enjoyment of their home.” (See pages 8-14 of Exhibit No.5).

Appellant #2 claims that individuals with electrical hypersensitivity are risking their lives by living in the vicinity of the County-approved telecommunications facility, and includes a letter from attorney Gail Flatt in his appeal, which contains the following statement: “My clients are a group of individuals living in and around the Village of Mendocino who have all been diagnosed with electrical hypersensitivity. ...They are asking only that there be a small part of the County where they can live relatively normal lives and avail themselves of the County’s services, programs and activities without risking their lives.” (See pages 29-31 of Exhibit No. 6).

The appellants do not cite a specific LCP policy that they feel the County’s actions do not conform with in this regard. The concerns raised by the appellants do not allege an inconsistency of the local approval with the certified LCP, but rather, the appellants raise general concerns about the detrimental health effects posed from RFR. Thus, because the contention does not allege an inconsistency of the local approval with the certified LCP, the Commission finds that this contention is not a valid grounds for appeal.

Even if the appellants could cite a specific LCP policy regarding the detrimental health effects of RFR, which they have not, the County’s and the Commission’s review of this issue is limited by the requirements of federal law.

The development as approved by the County would provide for the installation of a wireless telecommunications (cellular) facility designed to serve the Town of Mendocino and vicinity in compliance with Federal Communications Commission (FCC) safety regulations. Pursuant to Section 704(a)(7)(B)(iv) of the Telecommunications Act of 1996, and Title 47 Section 332(c)(7)(B)(iv) of the U.S. Code, “[n]o State or local government or instrumentality therefore may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission’s regulations concerning such emissions.” Therefore, the regulation of RFR emissions is a federal matter and is not within the purview of the Mendocino County LCP.

**b. Permit Obtained by Fraud**

Appellant #2 raises the contention that the County’s approval of the project relied on acceptance of a fraudulent engineering report submitted by the applicant to demonstrate compliance with FCC exposure limits. The appellant states that any mitigations approved by the Board of Supervisors in the way of fencing and signage were added with the fraudulent data in mind, and are wholly inadequate to mitigate the effects of the true

exposure conditions on-site. The appellant cites inconsistency of the project as approved with CZC Section 20.536.030(A)(1).

The appellant contends that the permit was obtained by fraud, and states that fraud is grounds for revocation under CZC Section 20.536.030(A)(1). CZC Section 20.536.030(A)(1) provides that a coastal development permit may be revoked or modified upon a finding that such permit was obtained or extended by fraud. While CZC Section 20.536.030(A)(1) does provide a mechanism for revocation of a permit obtained by fraud, it is not an LCP provision that governs the review of a project prior to approval by the County. The contention raises a procedural issue related to whether revocation should be taken up with the County after approval, and not a substantial or substantive inconsistency of the approved project with the certified LCP. The appellant may decide to utilize the permit revocation procedure set forth in CZC Section 20.536.020(A)(1) after any coastal development permit is actually issued for the County-approved project, but the contention does not allege an inconsistency of the project as approved with the certified LCP. Furthermore, this allegation of fraud relates to whether fencing and signage conditions imposed by the County are adequate to mitigate the effects of RFR from the approved project. As discussed in the previous section, the detrimental effects of RFR are not addressed by an LCP policy identified by the appellants. Therefore, whether or not any special conditions that may have been imposed by the County to mitigate the human health effects of RFR were influenced by the alleged fraudulent engineering report and are adequate, does not affect the consistency of the approved project with any identified substantive policy of the certified LCP. Therefore, the Commission finds that the appellant's contention does not raise a substantial issue of conformity of the approved project with the certified LCP even if it was a valid grounds for appeal.

**c. Previous Violations by the Property Owner**

Both appellants raise contentions that County Building Code and Coastal Act violations are occurring on the subject property related to previously permitted and un-permitted development. However, as discussed below, the legality of the existing development does not affect the consistency of the approved development with the certified LCP, and no LCP policies or standards are cited that allege inconsistency of the approved project with the certified LCP even if the alleged violations that may be occurring did affect the consistency of the approved development with the certified LCP.

The appellants assert that an existing ham radio antenna that is located on the subject parcel has been in violation of the Coastal Act for many years. The erection of the approximately 37-foot-tall lattice tower and ham radio antenna affixed to it are un-permitted development for which no coastal development permit was ever issued. In October 1979, the property owner applied for an after-the-fact coastal development permit to legalize an antenna and tower previously erected. The Commission granted CDP No. 79-A-106 on October 16, 1979 approving the applicant's amateur radio antenna

with two special conditions: (1) “[t]he applicant shall, within two months of the granting of the permit, lower the existing antenna to a height no greater than the height of the existing single family residence on the subject parcel;” and (2) “[p]rior to the issuance of the permit, the applicant will negotiate in good faith with the attorney general’s representative or the executive director to resolve any outstanding violations.” The antenna was never lowered as required by the special condition imposed, and the permit was never issued.

Additionally, Appellant #2 asserts that “[t]he existing deck, to which the antenna would be attached, is neither safe nor up to code. ...The house itself has been under construction for three decades, is still unfinished, and has never been finalized by a building inspector.” At the time the residence was constructed, the County code required the deck to have a safety railing, but a railing has never been provided for the deck. The appellants do not cite a specific LCP policy that they feel the County’s actions do not conform with in this regard. The concerns raised by the appellants do not allege an inconsistency of the local approval with the certified LCP, but rather, the appellants raise general concerns about the fact that the existing ham radio tower and antenna are in violation of the Coastal Act and the existing deck and home may be in violation of certain County building code provisions. The approval of the wireless telecommunications facility does not depend on the presence or absence of the ham radio tower and/or the deck railing to function or to be installed. Thus, because the contention does not allege an inconsistency of the local approval with the certified LCP, the Commission finds that this contention is not a valid grounds for appeal. The Commission notes that even though the appellant’s contention does not raise valid grounds for appeal, the County-approved permit would correct the apparent violations. Removal of the existing tower and ham radio antenna is required by Condition No. 21 of the County-approved permit, which states that: “[w]ithin 90 days or prior to activation of service of the wireless communication equipment on the site, whichever occurs first, the property owner shall remove the existing tower and antenna on the site.” Also, the County addresses the alleged building code violation regarding the deck railing by imposing Special Condition No. 22 that requires the owner to bring the deck up to current building code standards.

**d. Failure To Adhere To Planning Commission’s Wireless Communication Facilities Guidelines**

Appellant #1, through the letter attached to the appeal from attorney Rodney Jones raises a contention that the project as approved is inconsistent with County guidelines addressing wireless communication facilities. The Jones letter states: “[i]n November 2001, the [County Planning] Commission passed guidelines specifically addressing Wireless Communications Facilities. These are to ‘be followed to the greatest extent possible.’ Guideline No. 12 calls for a ‘narrative discussing the factors leading to the selection of the proposed site...including alternative sites considered.’ Standard B.1.a unequivocally states that sites ‘near residential areas or schools are least preferred and will only be considered when there is compelling evidence that no other less visible



alternative exists.”” The Mendocino County Planning Commission Guidelines on wireless communication facilities have never been incorporated into the LCP through an LCP amendment. The appellant does not cite a specific LCP policy or statement that they feel the County’s actions do not conform with in this regard. The concerns raised by the appellants do not allege an inconsistency of the local approval with the certified LCP, but rather an alleged inconsistency with other County guidelines that are not part of the LCP. Thus, because the contention does not allege an inconsistency of the local approval with the certified LCP, the Commission finds that the contention raised by the appellants is not a valid grounds for appeal.

**e. Lost Revenue When Cellular Service Facilities Are Not Located On Public Property**

Appellant #1, through the letter attached to the appeal from attorney Rodney Jones, raises a contention that “[c]ell towers should be located on public property so that the extensive amounts paid for use of such property inure to the public generally rather than flow into the pockets of private owners.” The appellant does not cite a specific LCP policy that they feel the County’s actions do not conform with in this regard. The concerns raised do not allege an inconsistency of the local approval with the certified LCP, but rather, the appellant comments that this wireless communications facility should be located on public property so that a public entity could derive rental income from the company establishing the communications facility. Thus, because the contention does not allege an inconsistency of the local approval with the certified LCP, the Commission finds that the contention raised by the appellants is not a valid grounds for appeal.

**f. Non-compliance with Americans With Disabilities Act**

Appellant #2 alleges an inconsistency of the County’s approval of the proposed development with the Americans With Disabilities Act (ADA). His appeal states that “[a] request for accommodation under the ADA was made to the Board of Supervisors, which improperly neither discussed, nor responded to the request before voting on the application.” The appellant included a letter from attorney Gail Flatt to the County that alleges that the ADA requires that reasonable modifications be made to the County’s zoning process to accommodate her clients who are diagnosed with electrical hypersensitivity. Ms. Flatt suggests that reasonable modification should be made requiring that Edge Wireless locate its cell tower outside of the area in and around the Village of Mendocino. (See pages 29 through 31 of Exhibit No. 6)

The appellant does not cite a specific LCP policy that they feel the County’s actions do not conform with in this regard. The concerns raised do not allege an inconsistency of the local approval with the certified LCP, but rather, the appellant expresses the opinion that the ADA requires that Edge Wireless locate its facility outside of the Village of Mendocino to accommodate a group of individuals who are diagnosed with electrical hypersensitivity. Thus, because the contention does not allege an inconsistency of the

local approval with the certified LCP, the Commission finds that the contention raised by the appellant is not a valid grounds for appeal.

**2. Appellants' Contentions That Are Valid Grounds For Appeal**

Eight of the fourteen contentions raised in this appeal do present potentially valid grounds for appeal in that they allege the project's inconsistency with policies of the certified LCP or with the public access policies of the Coastal Act. These contentions allege that the approval of the project by the County raises significant issues related to LCP provisions regarding: (a) geologic hazard; (b) not a principally permitted use; (c) non-conforming structures; (d) ESHA protection; (e) visual resources; (f) inconsistency of zoning code requirements related to CEQA; (g) lack of public notice; and (h) inconsistency with LCP overlooked because of misinterpretation of federal law.

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

*With respect to appeals to the commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.*

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." (California Code of Regulations, Title 14, Section 13115(b).) In previous decisions on appeals, the Commission has been guided by the following factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5.

In this case, for the reasons discussed further below, the Commission exercises its discretion and determines that with respect to all of the allegations below, the appeal raises no substantial issue with regard to the approved project's conformance with the certified Mendocino County LCP and the public access and recreation policies of the Coastal Act.

**Allegations Raising No Substantial Issue:**

**a. Geologic Hazard.**

Appellant #2 contends that the County approval of the project is inconsistent with Mendocino County's LCP policies and standards designed to protect coastal development from bluff retreat, in that the development as approved "does not comply with shoreline erosion and geologic requirements." The appellant cites CZC Section 20.500.020(B)(1) that requires geologic setbacks from the edges of coastal bluffs.

**LCP Policies and Standards**

LUP Policy 3.4-7 states:

*The County shall require that new structures be set back a sufficient distance from the edges of bluffs to ensure their safety from bluff erosion and cliff retreat during their economic life spans (75 years). Setbacks shall be of sufficient distance to eliminate the need for shoreline protective works. Adequate setback distances will be determined from information derived from the required geologic investigation and from the following setback formula:*

*Setback (meters) = Structure life (years) x Retreat rate (meters/year)*

*The retreat rate shall be determined from historical observation (e.g., aerial photographs) and/or from a complete geotechnical investigation.*

*All grading specifications and techniques will follow the recommendations cited in the Uniform Building Code or the engineering geologists report.*

CZC Section 20.500.020 Geologic Hazards—Siting and Land Use Restrictions states:

*(A) Faults...*

*(B) Bluffs.*

*(1) New structures shall be setback a sufficient distance from the edges of bluffs to ensure their safety from bluff erosion and cliff retreat during their economic life spans (seventy-five (75) years). New development shall be setback from the edge of bluffs a distance determined from information derived from the required geologic investigation and the setback formula as follows:*

$$\text{Setback (meters)} = \text{structure life (75 years)} \times \text{retreat rate (meters/year)}$$

*Note: The retreat rate shall be determined from historical observation (aerial photos) and/or from a complete geotechnical investigation.*

### Discussion

LUP Policy 3.4-7 and CZC Section 20.500.020 provide that a geotechnical investigation and report be prepared for new structures to determine an adequate blufftop setback so that new structures are setback a sufficient distance from the bluff edge to ensure their safety and eliminate the need for shoreline protective works.

Appellant #2 contends that the project as approved by the County is inconsistent with these certified LCP policies and standards. The appellant asserts that the LCP “requires new development to be set back from the edges of bluffs to ensure their safety from bluff erosion for 75 years... A coastal development permit for a new antenna to be located on a deck already extending over the edge of an eroding bluff should not be permitted.”

The project as approved authorizes attaching the antenna to an existing deck, which is a platform that serves as the foundation for an existing residence that was granted and issued a coastal development permit in 1973. The antenna would not extend the footprint of the presently permitted residence any closer to the ocean. The original permit did not include any condition prohibiting the installation of future shoreline protective works to protect the approved structures should such protective works be needed. The appellant has not presented any geotechnical evaluation indicating that the development as approved is in danger of succumbing to erosion by cliff recession within 75 years. No evidence has been provided that there is any extraordinary amount of coastal bluff erosion occurring at the site.

In approving the proposed development the County found that a geotechnical report was not necessary for the following reasons:

- (1) The site is underlain by solid rock visible along the westerly bluff face;
- (2) The area of construction lies within the area already developed with the existing residence and garage;

- (3) The earthwork involved with the project is not significant, consisting of minor trenching and a hole of approximately 3 cubic feet;
- (4) The project will impose no significant structural loads on the ground, or alter drainage patterns; and
- (5) The geologic bore holes necessary to prepare a full geotechnical report would constitute a disturbance to the site of nearly the same magnitude as the work proposed in association with the project.

To the extent that coastal bluff erosion were to threaten the approved antenna during its economic life, such erosion would also threaten the house itself which was previously permitted without any prohibition on the installation of future shoreline protective works to protect the structure. As the approved antenna would be attached to the previously permitted house, whatever action is taken at the time to protect the house from being endangered by bluff retreat and collapsing into the ocean, whether the action be moving the structures or constructing a shoreline protective device, would at the same time prevent the antenna from being undermined by bluff retreat and collapsing into the ocean. In addition, as discussed above, the County determined that the approved project would not increase the risk of geologic hazard affecting the site. Therefore, the installation of the approved antenna would not create any greater risk of geologic hazard affecting the site or engender any greater need for a seawall than already exists to protect the existing house.

Therefore, for all of the above reasons, no substantial issue is raised with regard to the conformance of the project as approved with the provisions of LUP Policy 3.4-7 and CZC Section 20.500.020. Given (1) the evidence submitted that the subject property is located in an area exhibiting stable bedrock, (2) the evidence submitted that the installation of the antenna would not increase the risk of geologic hazard, and (3) the lack of any countering geotechnical information suggesting that the development as approved is in danger of succumbing bluff retreat during its economic life, there is a high degree of factual and legal support for the local government's decision that the development is consistent with the geologic hazard provisions of the certified LCP. Therefore, the Commission finds that the contention raised by the appellant does not raise a substantial issue of conformance of the approved project with the certified Local Coastal Program and the public access policies of the Coastal Act.

**b. Not a Principally Permitted Use**

Appellant #2 contends that the County-approved development is not a principally permitted use where the subject property is located in a Rural Residential (RR:L5) zone. CZC Sections 20.320.075 and 20.320.080 describe conditional uses allowed in the applicable Rural Residential Zone.

LCP Policies and Standards

LUP Policy 2.2 – Description of Land Use Plan Map Designations – lists Principal Permitted Uses and Conditional Uses for property zoned Rural Residential:

*Principal Permitted Use: Residential and associated utilities, light agricultural, home occupation.*

*Conditional Uses: Cottage industry; conservation and development of natural resources; public facilities and utilities determined to be necessary on Rural Residential lands; recreation-education.*

CZC Section 20.320.075 – Major Impact Services and Utilities states:

*Services or facilities which may have a substantial impact. Such uses may be conditionally permitted when the public interest supercedes the usual limitations placed on land use and transcends the usual restraints of zoning for reasons of necessary location and community wide interest. Typical places or uses are power generating facilities, sewage disposal facilities, septage disposal facilities and sites, sanitary landfills (including recycling operations), water treatment plants and natural gas pipelines.*

CZC Section 20.320.080 – Minor Impact Utilities states:

*Public utilities which have a local impact on surrounding properties and are necessary to provide essential services. Typical uses are electrical and gas distribution lines, microwave transmitting/receiving stations and relay stations.*

CZC Section 20.376.010 – Principal Permitted Uses for RR Districts states:

*The following use types are permitted in the Rural Residential District:*

*(A) Coastal Residential Use Types.*

*Family Residential: Single-family  
Vacation Home Rental.*

*(B) Coastal Agricultural Use Types.*

*Light Agriculture;  
Row and Field Crops;*

*Tree Crops.*

*(C) Coastal Open Space Use Types.*

*Passive Recreation.*

CZC Section 20.376.015 – Conditional Uses for RR Districts states:

*The following are permitted uses upon the issuance of a coastal development use permit.*

*(A) Coastal Residential Use Types...*

*(B) Coastal Civic Use Types.*

*Alternative Energy Facilities: On-site;*

*Alternative Energy Facilities: Off-site;*

*Community Recreation;*

*Day Care Facilities/Small School;*

*Educational Facilities;*

*Fire and Police Protection Services;*

*Group Care;*

*Lodge, Fraternal and Civic Assembly;*

*Major Impact Services and Utilities;*

*Minor Impact Utilities;*

*Religious Assembly.*

### Discussion

The appellant asserts that the development as approved by the County “is not the principal permitted use in this Rural Residential zone, and it does not conform to the certified local coastal program.”

The Mendocino County certified Land Use Plan for the subject property is Rural Residential—5-acre minimum. This residential classification is intended to encourage local small scale farming with residences located as to create minimal impact on agricultural viability, and is not intended to be a growth area. Principally permitted uses for the Rural Residential land use classification of the LUP include residential and associated utilities, light agriculture, and home occupation. The certified coastal zoning code district for the subject property is Rural Residential – 5-acre minimum (RR-5). CZC Section 20.376.010 includes single-family, vacation home rental, light agricultural, row and field crops, tree crops, and passive recreation as principally permitted uses for the subject property.

Conditional uses allowed by use permit include cottage industry, conservation and development of natural resources, public facilities and utilities determined to be necessary on Rural Residential lands, and recreation-education. CZC Section 20.376.015 – Conditional Uses for RR Districts – includes Major Impact Services and Utilities and Minor Impact Utilities as conditional uses for the subject property. CZC 20.320.80 – Minor Impact Utilities – defines typical public service utilities as utilities necessary to provide essential services and provides the example of microwave transmitting/receiving stations and relay stations. Because the proposed cellular antenna would be an allowable conditional use on the property, the County required a use permit application for the telecommunications facility, and granted a coastal development permit that was a use permit for the project. Therefore, the County found that the proposed wireless facility is consistent with the planned use of the area.

The appellant is correct in stating that the approved antenna development is not a principally permitted use of the subject property. However, the certified LCP does allow for certain other uses in the RR zone if approved by use permit, including minor and major impact utilities such as the approved wireless telecommunications antenna. Because the County's approval granted use permit authorization for the antenna as a conditional use in the RR zone, there is a high degree of factual and legal support for the local government's decision that the development is consistent with the use provisions of the certified LCP.

Therefore, the Commission finds that the contention raised by the appellant does not raise a substantial issue of conformance of the approved project with provisions of the certified Local Coastal Program and the public access policies of the Coastal Act.

**c. Non-Conforming Structures.**

Appellant #2 contends that the County approval of the project is inconsistent with Mendocino County's CZC provisions governing geologic setback requirements for the continuance of non-conforming structures. The appellant states that CZC Section 20.480.010 lists the conditions under which non-conforming structures may be continued. "Addition of new uses types is not one of those conditions."

**LCP Policies and Standards**

CZC Section 20.480.005 states:

*To allow for the continued utilization of lawfully existing improvements and uses made nonconforming by the adoption of the Coastal Element of the Mendocino County General Plan and this Division, where the use is compatible with adjacent land uses and where it is not feasible to replace the activity with a conforming use.*



- (A) *A nonconforming use is a use of a structure or land which was lawfully established and maintained prior to the adoption of this Division but which does not conform with the use regulations for the zone in which it is located.*
- (B) *A nonconforming structure is a structure which was lawfully erected prior to the effective date of the application of these regulations but which, under this Division, does not conform with the standards of yard spaces, height of structures, distance between structures, parking, etc., prescribed in the regulations for the zone in which the structure is located.*

CZC Section 20.480.010 states:

- (A) *A legal nonconforming use or structure may be continued if it conforms to the following criteria:*
  - (1) *If the existing use is contained within a structure built or modified to accommodate the existing use, conformance is required with the applicable building code and/or zoning code in effect at the time of construction or modification.*
  - (2) *The use must be compatible with adjacent land uses, such that its hours of operation, noise levels, aesthetic impacts, and traffic to the site do not now significantly impact adjacent land uses.*
- (B) *Routine maintenance and repairs may be performed on a nonconforming structure or site.*

CZC Section 20.480.015 states:

*Existing legal nonconforming structures may be remodeled, rehabilitated or reconstructed as long as the exterior dimensions of the building remain the same.*

### Discussion

Appellant #2 contends that the project as approved by the County is inconsistent with the certified LCP policies and standards related to continuance of non-conforming structures. The appellant notes that the existing house was permitted in 1973, prior to certification of the geologic setback policies of the LCP on October 13, 1992. The appellant contends that the existing house does not conform to the certified geologic setback policies, and thus is a non-conforming structure relative to required geologic setbacks that would ensure the safety of the house from bluff erosion and cliff retreat during its economic life span of 75 years. The appellant asserts that the County's approval of the project violates the provisions of CZC Section 20.480.010, which state the circumstances under which non-conforming structures are allowed to continue.

The appellant assumes that the existing house is a non-conforming structure for purposes of required geologic setbacks simply because its construction pre-dates certification of the Mendocino County LCP. However, CZC Section 20.480.005(B) defines what a non-conforming structure is and states that it is a structure which was lawfully erected prior to the effective date of the application of these regulations, but which does not conform with the standards of the coastal zoning code for yard spaces, height of structures, distance between structures, parking, etc., that are prescribed in the regulations for the zone in which the structure is located. The appellant asserts that because of its alleged noncompliance with the geologic setback requirements, the house is a non-conforming structure, but no evidence is provided that demonstrates any inconsistency with geologic setback requirements. The geologic hazard policies articulated by LUP Policy 3.4-7 and CZC Section 20.500.020(B) of the LCP as described above were adopted after the house was built, and only require that “new” structures and not already existing structures, be set back a sufficient distance from the bluff edge to ensure their safety from bluff retreat during their economic life span. The house is not a new structure, and is already more than 30 years old. Even if LUP Policy 3.4-7 and CZC Section 20.500.020(B) applied when the house was built, there are no indications that coastal bluff retreat would affect the house over its economic life. In fact, the County made a finding that the site is underlain by solid rock, and did not require a geotechnical study for the proposed development. No evidence has been provided demonstrating that the existing permitted house and garage do not conform to the other zoning code provisions that apply in the RR district. In fact, consistent with the current zoning code requirements, the existing permitted house and garage observe minimum front, side and rear yard setbacks of at least 20 feet, as well as conform to the height limitations requiring the structures be no higher than 18 feet above average natural grade.

Whether or not the structure is a legal non-conforming structure, there is no substantial issue as to whether the structure meets the criteria under which CZC Section 20.480.010 allows a legal non-conforming structure to be continued. CZC Section 20.480.010 allows for the continuance of a legal non-conforming structure according to two criteria: (1) if the existing use is contained within a structure built or modified to accommodate the existing use, conformance is required with the applicable building code and/or zoning code in effect at the time of construction or modification; and (2) the use must be compatible with adjacent land uses, such that its hours of operation, noise levels, aesthetic impacts, and traffic to the site do not now significantly adversely impact adjacent land uses.

Regarding the first criterion, the original and existing use of the structure is as a single-family residence, and the house was originally constructed as a single-family residence. No evidence has been submitted, except for the lack of a deck railing, that the house as originally approved does not conform to the building and zoning codes applicable at the time of construction. Even if the house is non-conforming, as a condition of approval, the County is requiring the deck to be brought up to code. In addition, the house appears

to conform to the basic building code and zoning code (R-R, Residential-Resort) requirements in effect for the property at the time the house was constructed, such as front yard and side yard setback requirements and height limitations. Regarding the second criterion, the use is compatible with adjacent land uses in that the house will continue to be used as a single-family residence consistent with the use of adjacent lands as a residential area with other residences of a similar or larger scale around it, and its “hours of operation, noise levels, aesthetic impacts, and traffic to the site” would not present significant adverse impacts to the adjacent residentially-zoned land uses. Therefore, even if the house were a non-conforming structure, which it is not, the house conforms to both criteria set forth in CZC Section 20.480.010 necessary for continuance of a non-conforming structure.

The appellant also contends that “addition of new use types” is not a condition under which non-conforming structures may be continued. The appellant misinterprets CZC Section 20.480.010(A). To be allowed to continue, a legal non-conforming use need only conform to two criteria: A(1) and A(2). As discussed above, the existing structure would meet those criteria if it were a legal non-conforming structure. CZC Section 20.480.010(A) does not preclude combining new conforming uses with previous non-conforming uses. As discussed above, the approved antenna use is a conforming use in the RR zone. Minor and major impact utilities are allowed as a conditional use in the RR zone, and the County granted a use permit for this antenna.

In addition, CZC Section 20.480.015 specifically allows remodeling, rehabilitation and reconstruction of existing legal non-conforming structures as long as the exterior dimensions of the building remain the same. The coastal development use permit as approved by the County would not increase the building footprint or height, and is therefore also in compliance with CZC Section 20.480.015.

For all of the above reasons, there is a high degree of factual and legal support for the local government's decision that the development is consistent with the legal nonconforming structure provisions of the certified coastal zoning code.

Therefore, the Commission finds that the contention raised by the appellant does not raise a substantial issue of conformance with the certified Local Coastal Program and the public access policies of the Coastal Act.

**d. ESHA Protection.**

Both appellants contend that the County approval of the project is inconsistent with Mendocino County's LCP policies and standards designed to protect ESHA. Appellant #1 points out that the siting of the approved wireless communications facility would occur “near a shorebird roosting, resting and nesting area” inconsistent with LUP Policy 3.1-2. Appellant #2 did not cite any LCP policies or standards regarding ESHA

protection, but did state that ground animals and birds are at risk from the development as approved.

LCP Policies and Standards

Policy 3.1-2 states in applicable part:

*Development proposals in environmentally sensitive habitat areas such as wetlands, riparian zones or streams or sensitive plant or wildlife habitats (all exclusive of buffer zones) including, but not limited to those shown on the Land Use Maps, shall be subject to special review to determine the current extent of the sensitive resource. Where representatives of the County Planning Department, the California Department of Fish and Game, the California Coastal Commission, and the applicant are uncertain about the extent of sensitive habitat on any parcel such disagreements shall be investigated by an on-site inspection by the landowner and/or agents, County Planning Department staff member, a representative of California Department of Fish and Game, [and] a representative of the California Coastal Commission...If all of the members of this group agree that the boundaries of the resource in question should be adjusted following the site inspection, such development should be approved only if specific findings are made which are based upon substantial evidence that the resource as identified will not be significantly degraded by the proposed development. If such findings cannot be made, the development shall be denied...*

Policy 3.1-7 states in applicable part,

*A buffer area shall be established adjacent to all environmentally sensitive habitat areas. The purpose of this buffer area shall be to provide sufficient area to protect the environmentally sensitive habitat from significant degradation resulting from future developments. The width of the buffer area shall be a minimum of 100 feet, unless an applicant can demonstrate, after consultation and agreement with the California Department of Fish and Game, and County Planning Staff, that 100 feet is not necessary to protect the resources of that particular habitat area from possible significant disruption caused by the proposed development. The buffer area shall be measured from the outside edge of the environmentally sensitive habitat areas and shall not be less than 50 feet in width. New land division shall not be allowed which will create new parcels entirely within a buffer area. Developments permitted within a buffer area shall generally be the same as those uses permitted in the adjacent environmentally sensitive habitat area and must comply at a minimum with each of the following standards:*

1. *It shall be sited and designed to prevent impacts which would significantly degrade such areas;*

2. *It shall be compatible with the continuance of such habitat areas by maintaining their functional capacity and their ability to be self-sustaining and to maintain natural species diversity; and*
3. *Structures will be allowed within the buffer area only if there is no other feasible site available on the parcel. Mitigation measures, such as planting riparian vegetation, shall be required to replace the protective values of the buffer area on the parcel, at a minimum ratio of 1:1, which are lost as a result of development under this solution.*

Section 20.496.020 of the Coastal Zoning Ordinance states in applicable part:

*ESHA- Development Criteria*

- (A) *Buffer areas. A buffer shall be established adjacent to all environmentally sensitive habitat areas. The purpose of this buffer area shall be to provide for a sufficient area to protect the environmentally sensitive habitat from degradation resulting from future developments and shall be compatible with the continuance of such habitat areas.*

(1) *Width.*

*The width of the buffer area shall be a minimum of one hundred (100) feet, unless an applicant can demonstrate, after consultation with the California Department of Fish and Game, and County Planning staff, that one hundred feet is not necessary to protect the resources of that particular habitat area from possible significant disruption caused by the proposed development. The buffer area shall be measured from the outside edge of the Environmentally Sensitive Habitat Areas and shall not be less than fifty (50) feet in width....*

Standards for determining the appropriate width of the buffer area are as follows:

- (a) *Biological Significance of Adjacent Lands.*  
...
- (b) *Sensitivity of Species to Disturbance.*  
...
- (c) *Susceptibility of Parcel to Erosion.*  
...
- (d) *Use of Natural Topographic Features to Locate Development.*  
...
- (e) *Use of Existing Cultural Features to Locate Buffer Zones.*  
...
- (f) *Lot Configuration and Location of Existing Development.*  
...
- (g) *Type and Scale of Development Proposed.*

Discussion

LUP Policy 3.1-2 cited by Appellant #1 requires that development proposals in ESHA such as wildlife habitat, shall be subject to special review to determine the current extent of the sensitive resource. LUP Policy 3.1-7 requires that a buffer area shall be established adjacent to all ESHA to provide sufficient area to protect the ESHA from significant degradation from future development. The width of the buffer shall be a minimum of 100 feet unless it is determined by the Department of Fish and Game that a narrower buffer (not less than 50 feet) would protect the resources of the habitat area.

The appellants raise concerns about the protection of shorebird roosting, resting, and nesting areas and ground animals and birds. The appellants contend that the County approval is inconsistent with the LCP ESHA protection policies as it would harm wildlife due to the close proximity of the communications facility to their habitat. The appellants imply that the RFR emissions from the approved facility would have significant adverse impacts on ESHA.

The appellants' appeals are not specific enough to understand the reasons for the contention that ESHA resources would be jeopardized. The County analyzed possible negative impacts of approving the project such as increased noise, annoying light and glare, reduction in air quality or water quality, and prior to approval found that no significant adverse environmental impacts to ESHA would occur from the proposed project.

The appellants have not provided any biological information or other documentation verifying that any ESHA actually exists at or near the site, and the County staff report does not identify any. Appellant #1 provided pictures of the bluffs and indicated that birds roost on the bluffs, but the pictures do not depict any roosting birds, and the appellants have not otherwise demonstrated that ESHA exists at the site. The development as approved would be underneath the existing platform that provides the deck and foundation for the house, and inside the existing garage, and in neither of these locations would the development encroach any closer to any identified ESHA that might exist in the area. Furthermore, as discussed previously, the County's and the Coastal Commission's consideration of certain aspects of the approved development under appeal is bound by the requirements of federal law. Pursuant to Section 704(a)(7)(B)(iv) of the Telecommunications Act of 1996, and Title 47 Section 332(c)(7)(B)(iv) of the U.S. Code, "[n]o State or local government or instrumentality therefore may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions." Thus, there is a high degree of factual and legal support for the local

government's decision that the development is consistent with the ESHA protection provisions of the certified LCP.

e. **Visual Resources.**

Both appellants contend that the County approval of the project is inconsistent with Mendocino County's LCP policies and standards related to protection of visual resources. The appellants cite inconsistency of the project as approved with LCP Policy 4.7-10 and CZC Section 20.504.15.

LCP Policies and Standards

Policy 3.5-1 states in applicable part:

*The scenic and visual qualities of Mendocino County coastal areas shall be considered and protected as a protected resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas designated by the County of Mendocino Coastal Element shall be subordinate to the character of its setting.*

LCP Policy 3.5-3 states in applicable part:

*The visual resource areas listed below are those which have been identified on the land use maps and shall be designated as "highly scenic areas," within which new development shall be subordinate to the character of its setting. Any development permitted in these areas shall provide for the protection of ocean and coastal views from public areas including highways, roads, coastal trails, vista points, beaches, parks, coastal streams, and waters used for recreational purposes.*

...

*-Portions of the coastal zone within the Highly Scenic Area west of Highway 1 between the Ten Mile River estuary south to the Navarro River as mapped with noted exceptions and inclusions of certain areas east of Highway 1.*

*...New development should be subordinate to natural setting and minimize reflective surfaces. All proposed divisions of land and boundary line adjustments within "highly scenic areas" will be analyzed for consistency of potential future development with visual resource policies and shall not be allowed if development of resulting parcel(s) could not be consistent with visual policies.*

LCP Policy 4.7-10 states:

*Brewery Gulch Road south of Big River on the west side of Highway One shall be preserved as an existing bluff top access affording spectacular views of Mendocino Bay and the town of Mendocino. These views shall be protected and enhanced by possible future relocations of power lines as indicated in Policy 4.7-3.*

CZC Section 20.504.010 states in applicable part:

*The purpose of this section is to insure that permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas and, where feasible, to restore and enhance visual quality in visually degraded areas.*

CZC Section 20.504.15 states in applicable part:

*Coastal Zoning Ordinance Section 20.504.015 – Highly Scenic Areas.*

(A) *The visual resource areas listed below are those which have been designated highly scenic and in which development shall be subordinate to the character of its setting:*

...

(2) *Portions of the Coastal Zone within the Highly Scenic Area west of Highway 1 between the Ten Mile River estuary south to the Navarro River as mapped with noted exceptions and inclusions of certain areas east of Highway 1.*

...

(C) *Development Criteria.*

(1) *Any development permitted in highly scenic areas shall provide for the protection of coastal views from public areas including highways, roads, coastal trails, vista points, beaches, parks, coastal streams, and waters used for recreational purposes.*

(2) *In highly scenic areas west of Highway 1 as identified on the Coastal Element land use plan maps, new development shall be limited to eighteen (18) feet above natural grade, unless an increase in height would not affect public views to the ocean or be out of character with surrounding structures.*

(3) *New development shall be subordinate to the natural setting and minimize reflective surfaces. In highly scenic areas, building materials*



*including siding and roof materials shall be selected to blend in hue and brightness with their surroundings.*

*(4) All proposed divisions of land and boundary line adjustments within highly scenic areas shall be analyzed for consistency of potential future development with the regulations of this Chapter, and no division of land or boundary line adjustment shall be approved if development of resulting parcel(s) would be inconsistent with this Chapter.*

...

*(11 Power transmission lines shall be located along established corridors where possible and where the corridors are not visually intrusive.*

### Discussion

The subject property is designated as highly scenic. LUP Policy 3.5-1 and Chapter 20.504 of the Coastal Zoning Code require that new development in highly scenic areas be sited and designed to protect views to and along scenic coastal areas, and be subordinate to the character of its setting. LUP Policy 3.5-3 requires new development in highly scenic areas to provide for the protection of ocean and coastal views from public areas including highways, coastal trails, and beaches. LUP Policy 4.7-10 specifically provides that the views from Brewery Gulch Drive shall be protected and enhanced by the relocation of power lines.

Both appellants contend that the project as approved by the County is inconsistent with LCP policies and standards regarding visual resources and development within highly scenic areas. The project location is on a blufftop parcel west of Highway 500B (Brewery Gulch Drive) in an area that offers spectacular views overlooking Mendocino Bay and the town of Mendocino to the north. Appellant #1 states that “the new stealth tower...will be near road 500B-(also known as Brewery Gulch Dr.) which is designated part of the coastal hiking trail.” The appellant asserts through the letter from their attorney, Rodney Jones, that in approving the project, the County failed to adequately explore less intrusive sites with alternative system designs and alternative tower and antenna designs. Appellant #1 further contends that the size and location of the facility as approved by the County limits co-location and “would result in having many, many more sites to deal with.” The letter from Attorney Jones also emphasizes the benefits of co-location and states that “co-location [is] an essential element of an acceptable site. Failure [to co-locate] offers the prospect of spawning a ‘tower war’ by other providers wanting a bite of the Mendocino pie.” Attorney Jones suggests the County approve an alternative site with a bigger (but camouflaged) tower that offers more opportunity for other providers to co-locate. Moreover, Appellant #1 refers to the existing un-permitted ham radio tower and antenna on the property, stating that it is “extremely visible.” Attorney Jones believes that the current ham tower “far exceeds the height of the residence, standing approximately three times higher at around sixty feet... [T]he Coastal Zone height limit under all circumstances is not to exceed 18 feet above natural grade

(Section 20.504.15).” Appellant #2 also refers to the presence of the un-permitted ham radio tower and antenna, and states that its existence is an “eyesore in one of the most scenic points on the coast....” Appellant #2 then refers to LCP Policy 4.7-10, which describes the location of the subject property (Brewery Gulch Road south of Big River on the west side of Highway One) and states that the area shall be preserved as an existing bluff top access affording spectacular views of Mendocino Bay and the town of Mendocino.

As discussed below, the Commission finds that none of these contentions and issues raised by the appellants concerning protecting views from public vantage points raise substantial issues of conformance of the project as approved with the visual resource policies of the LCP.

The subject property is currently developed with a single-family residence, and detached garage. There also is a ham radio tower and antenna located in the front yard of the property between the garage and the residence, which is alleged to be un-permitted development because it was constructed without the benefit of a coastal development permit. The antenna extends to a height approximately 60 feet above the ground, and is mounted on an approximately 37-foot-tall lattice tower attached to a wooden pole. The erection of the tower and ham radio antenna affixed to it are also alleged to be un-permitted development for which no coastal development permit was ever issued. In October 1979, the property owner applied for an after-the-fact coastal development permit to legalize the antenna and tower, which had been previously erected. The Commission granted CDP No. 79-A-106 on October 16, 1979 approving the applicant’s amateur radio antenna with two special conditions: (1) “[t]he applicant shall, within two months of the granting of the permit, lower the existing antenna to a height no greater than the height of the existing single family residence on the subject parcel;” and (2) “[p]rior to the issuance of the permit, the applicant will negotiate in good faith with the attorney general’s representative or the executive director to resolve any outstanding violations.” The antenna was never lowered as required by the special condition imposed, and the permit was never issued. The current project as approved by the County would allow placement of a 53-inch by 25-inch radio cabinet within the existing garage, and placement of a stealth antenna underneath the exterior deck, which forms the foundation platform upon which the permitted house is built. The antenna would be housed in a fiberglass composite shell “false pier” suspended from the deck, and would have an appearance similar to the other concrete piers supporting the deck/platform and house. No grading, vegetation removal, or road extensions would be performed. Only minimal trenching would be necessary for placement of underground coaxial cable connecting the antenna and radio equipment located in the garage. The antenna would be approximately eighty-five feet from the County Road, and approximately 500 feet from the nearest neighbor to the south.

Impact of Approved Development on Views to and Along the Coast

With regard to the contentions that the approved development would adversely affect views to and along the coast from Brewery Gulch Drive and other public vantage points, the Commission notes that due to its design and location under the deck, very little of the facility would be visible from public locations. The approved antenna's distance from public locations would make it very difficult to identify the stealth antenna as anything other than a supporting foundation for the existing deck. In addition, the repairs to the existing wooden fence between the subject property and County Road 500B required by County-imposed Special Condition No. 20 would have very little impact on views. The existing fence is constructed of rough finished grape stakes that are spaced apart from each other, and approximately 3½ feet tall on average. The repairs to the existing fence and gates would simply restore the fence to its original condition and would not block views because of the approximately 4-inch gaps between the grape stakes, and the fact that the fence averages only about 3 ½ feet in height. Moreover, the radio equipment would be housed inside the existing garage and be completely invisible. Therefore, the Commission finds that no substantial issue is raised that the approved development would adversely affect views to and along the coast inconsistent with LUP Policies 3.5-1 and 3.5-3 and Chapter 20.504 of the Coastal Zoning Code.

Opportunities for Co-Location of Cell Phone Antenna

With regard to the contention that the approved development would not provide for the opportunity to co-locate cell phone antenna facilities from more than one service provider, the Commission agrees that providing co-location capability when siting antenna towers can minimize the cumulative impact on visual resources of cell phone antenna development. However, the Commission notes that the County imposed Special Condition No. 11 to require the applicant to "negotiate in good faith with third parties requesting shared use of this site." Therefore, no substantial issue of conformance is raised that the project as approved will lead to cumulative adverse impacts on coastal visual resources by failing to allow for co-location of cell phone facilities.

Impacts of Existing Ham Radio Tower and Antenna

With regard to the contention that the existing ham radio tower and antenna creates adverse visual impacts, the existence of the approximately 60-foot-tall, un-permitted, ham radio tower and antenna on the subject property is a source of numerous complaints. Both appellants assert that the County was wrong to approve the present application for a use permit to develop a communications facility on the same property with the existing illegal tower and antenna. However, the application before the County included a proposal to remove the existing ham radio tower and antenna from the subject property. The County imposed Special Condition No. 21 to require removal of this un-permitted development within 90 days or prior to activation of service of the wireless communication equipment on the site. Therefore, with approval of the permit, the

alleged adverse visual resource impacts from the ham tower and antenna would be removed pursuant to the special condition, and no substantial issue is raised of conformance of the ham radio tower and antenna to the visual resource protection policies of the certified LCP.

Development Subordinate to the Character of its Setting

The Commission finds that the project as approved raises no substantial issue with regard to visual resource protection requirements of the certified LCP that new development be subordinate to the character of its setting for several reasons. First, the placement of the radio equipment within the existing garage would completely hide from view that portion of the approved development. Second, the stealth antenna hung under the existing deck would be camouflaged to look like the other foundation piers for the platform of the house and deck. Finally, the improvement to the fence running along the road frontage would match the materials and height of the existing fence. The Commission notes that the extent and scope of the development approved by the County is very small, as it consists of (1) installation of an antenna housed in a fiberglass shell fake-pier to be suspended from underneath the deck of the existing house, (2) installation of a radio cabinet placed within the existing garage of the house, (3) burial of underground cables, and (4) in-kind repairs to an existing fence. Therefore, for the reasons discussed above, the appeal does not raise a substantial issue of consistency of the approved development with the visual resource provisions of the certified LCP, including LUP Policies 3.5-1, 3.5-3, and 4.7-10; and Chapter 20.504 of the Coastal Zoning Code. Therefore, the Commission finds that the contention raised by the appellant does not raise a substantial issue of conformance with the certified Local Coastal Program and the public access policies of the Coastal Act.

**f. Inconsistency of Zoning Code Requirements Related to CEQA**

Appellant #2 alleges an inconsistency of the County's approval of the proposed development with Mendocino's certified CZC Section 20.532.040 and CEQA.

LCP Policies and Standards

Section 20.532.040 states:

*Upon acceptance of an application as complete, the Director or his designee shall complete an environmental review of the project as required by the California Environmental Quality Act (CEQA), shall study the project for conformance with all applicable requirements of this Chapter. The Director shall refer relevant portions of the completed application to those departments, agencies or individuals who received copies of the application during application check, or other individual/group that the department believes may have relevant authority or expertise. The Director or designee shall prepare a written report and*

*recommendation for action on the application with findings and evidence in support thereof.*

Discussion

Appellant #2 contends that the approved project is inconsistent with CZC Section 20.532.040 because in the appellant's opinion, the environmental review for the project was flawed with regard to human health and also animal life. The appellant states, "both ground animals and birds are at risk, particularly as the project is next to Big River State Park and the antenna would sit atop a bluff harboring bird rookeries."

Coastal Zoning Code Section 20.532.040 requires the County to complete an environmental review of the proposed project as required by CEQA, but CEQA is not itself a substantive LCP policy by which the consistency of the approved development is measured. Rather, the requirement of CZC Section 20.532.040 deals with the procedure leading up to the County action, and does not deal with the project as approved. Thus, the contention raises a procedural inconsistency and not a substantial or substantive inconsistency of the approved project with the certified LCP. In addition, the coastal resource that the appellant indicates is affected by the allegedly flawed environmental review process is ESHA. However, the appellant has not provided any evidence that ESHA is actually present or even that other wildlife would be harmed by the project as approved. Therefore, the significance of the coastal resource affected by the decision is not substantial.

Therefore, the Commission finds that the contention raised by the appellant does not raise a substantial issue of conformance of the approved project with provisions of the certified Local Coastal Program and the public access policies of the Coastal Act.

**g. Lack of Public Notice**

Appellant #2 alleges an inconsistency of the County's approval of the proposed development with requirements for public notice as required in CZC Section 20.536.005(D)(4) and (6).

LCP Policies and Standards

CZC Section 20.536.005(D) states:

*Notice that the Coastal Permit Administrator will report proposed issuance of the coastal development administrative permit to the Board of Supervisors shall be mailed at least ten (10) calendar days prior to the meeting. The notice shall be provided by first class mail to:*

- (1) *The applicant;*
- (2) *All property owners within three hundred (300) feet of the property lines of the project site, and to each occupant of property within one hundred (100) feet of the property lines of the project site. Where the applicant is the owner of all properties within three hundred (300) feet of the property lines of the project site, notice shall be provided to all property owners within three hundred (300) feet and to all occupants within one hundred (100) feet of the applicant's contiguous ownership;*
- (3) *All persons who have requested to be on the mailing list for that development project;*
- (4) *All persons who have furnished self addressed and stamped envelopes and requested to be on the mailing list for development located within the Coastal Zone boundaries; and*
- (5) *The Coastal Commission.*

#### Discussion

The appellant contends that approval of the proposed project included provisions for repairing a 50-foot fence “at the last minute by the Board of Supervisors on the subject property, (a) with no advance public notice; (b) with no public discussion or input; (c) with almost no discussion by the Board of Supervisors itself.”

CZC Section 20.536.005(D) sets forth County noticing requirements for reporting proposed issuance of coastal development administrative permits, but this zoning code provision is not itself an LCP provision by which the consistency of the approved development is measured. The proposed development was approved by the Board of Supervisors, and was not an administrative permit governed by the requirements of CZC Section 20.536.005(D). Even if CZC Section 20.536.005(D) were applicable to the Board's review of the permit application, the noticing requirements of CZC Section 20.536.005 (D) are process oriented, and deal with the procedure leading up to the County action. The contention therefore raises a procedural inconsistency and not a substantial or substantive inconsistency of the approved project with the certified LCP. The contention thus raises a local issue relevant to internal procedures and not an issue of regional significance since the County has LCP notification policies in place and the County's decision to approve the permit would not influence the existing LCP standards that include notification provisions. Furthermore, the Commission notes that it's own hearing on this appeal has provided additional opportunities for interested parties to provide comments on the project.

Therefore, the Commission finds that the contention raised by the appellant does not raise a substantial issue of conformance of the approved development with the certified Local Coastal Program and the public access policies of the Coastal Act.

**h. Inconsistency with LCP Overlooked Because of Misinterpretation of Federal Law**

Appellant #1 contends that the County approved the project based on a mistaken belief that denial of the project would constitute a prohibition on the provision of personal wireless communication services in violation of federal law. Currently, there is a gap in cell phone services of any kind in and around the Town of Mendocino. The contention suggests that the County mistakenly believed that failure to approve the facility to fill the gap in cell phone service would be in violation of federal law. The appellant submitted a letter from their attorney, Rodney Jones, as part of the appeal that opines that a County denial would not have been in violation of federal law. The letter from Mr. Jones states in part:

“The fact that there is a gap in the coastal service area with respect to the town of Mendocino does not compel you to fill that gap based on request of the Kings, Edge, or any other service provider. Refusing to fill such a gap does not constitute a ‘prohibition’ within the meaning of federal law. (OmniPoint Communications, Inc. v. Scranton (M.D. Pa. 1999) 36 F.Supp.2<sup>nd</sup> 222,233 (‘Were courts to hold that merely because there are some gaps in service in an area...the public interest necessarily tips the balance in favor of allowing a variance, local boards would be obliged to approve virtually every application.’)) Thus, you should not feel stampeded or pressured into making a decision favorable to King/Edge based on a claim that an unfavorable decision would constitute a ‘prohibition’ in violation of federal law. In fact, the FCC regulations themselves expressly contemplate that there will exist so-called service ‘dead spots.’ (360 Communications Co., supra.). ...From the available information in the file, it appears that the service gap only concerns the town proper of Mendocino. Evidently, some cell service is available from the headlands to the west of town, south toward Little River, and on the road north to Fort Bragg.”

The appellants imply that the project as approved is inconsistent with the LCP and the County approved it out of a mistaken belief that to deny the project would violate federal law. However, as discussed above, none of the other contentions of the appeals raise a substantial issue of conformance of the project as approved with the certified LCP.

Therefore, the Commission finds that the contention raised by the appellant does not raise a substantial issue of conformance with the certified Local Coastal Program and the public access policies of the Coastal Act.

Conclusion

The Commission finds that for the reasons stated above the appeal raises no substantial issue with respect to conformance of the approved project with the certified LCP.

EXHIBITS

1. Regional Location Map
2. Vicinity Location Map
3. Project Plans
4. Notice of Final Action
5. Appeal #1 – James and Bettilou Lovera
6. Appeal #2 – Arthur Firstenberg
7. Photographs
8. CDP for Existing House
9. Applicant's Correspondence